

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 03-5314

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ELOUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,  
v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, et al.,

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR THE APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici:

Defendants-Appellants are Gale A. Norton, as Secretary of the Interior; David W. Anderson, as Assistant Secretary of Interior-Indian Affairs; and John W. Snow, as Secretary of Treasury. The named plaintiffs-appellees in this class action are Elouise Pepion Cobell; Mildred Cleghorn; Thomas Maulson; and James Louis Larose. Earl Old Person is no longer a class representative but remains a member of the class. The class consists of present and former beneficiaries of Individual Indian Money accounts, excluding those who had filed their own actions prior to the filing of the complaint in this case.

B. Rulings Under Review:

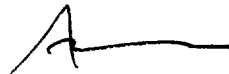
Appellants seek review of the structural injunction and memorandum opinions entered on September 25, 2003, by Judge Royce C. Lamberth, United States District Court for the District of Columbia, in Civ. No. 96-1285 (RCL). The order and accompanying memorandum opinions are published at 283 F. Supp. 2d 66 (D.D.C. 2003).

C. Related Cases:

This case has previously been before this Court in Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003), and Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

The government has filed an appeal from a preliminary injunction entered in this case on July 28, 2003. See No. 03-5262. On the government's motion, the Court has placed that appeal on the same briefing schedule as the present appeal. On March 15, 2004, the district court issued a second preliminary injunction dealing with the same subject matter as the July 28, 2003 injunction. The appeal from that injunction, No. 04-5084, has been consolidated with No. 03-5262.

The government has filed a petition for writ of mandamus in this case seeking the disqualification of Special Master Alan Balaran. See No. 03-5288 (argument scheduled for April 8, 2004). Other mandamus petitions arising out of the same case have been filed by various parties in Nos. 03-5047, -48, -49, -50, & -57. Argument on those petitions was heard on March 15, 2004.



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## GLOSSARY

APA	Administrative Procedure Act
Accounting Plan	Interior's <u>Historical Accounting Plan for Individual Money Accounts</u>
BIA	Bureau of Indian Affairs
Comprehensive Plan	Interior's <u>Comprehensive Trust Management Plan</u>
DOI	Department of the Interior
IIM Accounts	Individual Indian Money Accounts
TAAMS	Trust Asset and Accounting Management System

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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BRIEF FOR THE APPELLANTS

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**STATEMENT OF JURISDICTION**

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. 1331 and 1361, inter alia. On September 25, 2003, the district court issued a "structural injunction." The government filed a timely notice of appeal on October 29, 2003. This Court has jurisdiction under 28 U.S.C. 1292(a)(1).

**STATEMENT OF THE ISSUES**

The American Indian Trust Fund Management Reform Act, enacted in 1994, requires the Department of the Interior to account for the daily and annual balance of funds held in trust for an individual Indian. In 2001, this Court held that Interior had unreasonably delayed in providing that accounting and affirmed, in part, a declaratory judgment that remanded the

matter to the agency. The district court has now issued a "structural injunction" that encompasses a broad range of activities related to the accounting as well as the overall management of funds and lands held in trust for individual Indians. The issues presented for review are:

1. Whether the subsequent enactment of Pub. L. No. 108-108, providing that no provision of law shall be construed or applied to require the Department of the Interior to commence or continue an accounting of Individual Indian trust monies, deprives the structural injunction of any legal basis.

2. Whether, independent of the passage of Pub. L. No. 108-108, the district court lacked authority to issue the structural injunction, which assumes control over the operations of an executive branch agency and extends to matters having little or no relation to the conduct of an accounting.

3. Whether there is any basis for the duties that the structural injunction purports to enforce.

4. Whether there is any basis for the district court's continuing jurisdiction in light of the government's substantial progress with regard to the accounting of funds held in trust for individual Indians, Congress's active role in determining future accounting activities, and the manner in which the district court has exercised its jurisdiction to date.

## PERTINENT STATUTES AND REGULATIONS

Pertinent statutory provisions are set forth in the addendum to this brief.

### STATEMENT OF THE CASE

1. The Department of the Interior ("Interior" or "DOI") currently holds approximately \$415 million in trust for the benefit of individual Indians. These funds are maintained in about 260,000 separate accounts - the Individual Indian Money ("IIM") accounts that are the subject of this litigation.

The complexities of trust fund management are enormous, and in 1992 a congressional committee issued a report detailing multiple problems with the management of the individual and tribal trust funds. The committee expressed particular concern over Interior's failure "to provide a full and accurate accounting of the individual and tribal account funds." H.R. Rep. No. 102-499, at 2 (1992). At the same time, the committee cautioned that it would make "little sense to spend" as much as the \$281 million to \$390 million that had been estimated as the cost of auditing the IIM accounts. Id. at 26.

In 1994, based largely on the findings in this committee report, Congress enacted the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act"). Section 102(a) provides that "[t]he Secretary shall account for the daily and annual balance of all funds held in

trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)."

2. Plaintiffs brought this class action in 1996, asserting statutory and common law claims. The district court dismissed the common law claims, Cobell v. Babbitt, 91 F. Supp. 2d 1, 28-31 (D.D.C. 1999), but held that plaintiffs could "seek to enforce their statutory right to an accounting as that phrase is meant under the provisions of [the 1994 Act]," id. at 27. The court explained that such "statutorily-based claims against the government can be brought under the APA." Id. at 29.

The court held that Interior had an enforceable duty to provide an accounting for IIM funds, including funds deposited prior to passage of the 1994 Act. Because the agency had not yet provided such an accounting, the court remanded the matter to allow DOI the opportunity to come into compliance. The court retained jurisdiction for five years, and required DOI to file quarterly reports explaining the steps taken to rectify the breaches found. Id. at 56. The court also purported to declare breaches of trust obligations with respect to a variety of other matters, including staffing and computer support. Id. at 48-49, 58.

This Court largely affirmed, rejecting the government's contention that Congress had committed to the agency's discretion



decisions regarding the extent to which to review transactions that pre-dated the 1994 Act. Cobell v. Norton, 240 F.3d 1081, 1102 (D.C. Cir. 2001). The Court further held that the agency action had been improperly delayed under governing APA standards, 5 U.S.C. 706(1). Id. at 1108. It explained, however, that the only actionable breach of duty was the failure to produce an accounting. It thus required the district court to amend its order to the extent that it had held that operations that may have an effect on an accounting (such as the maintenance of a computer system) constituted breaches of an enforceable duty. Id. at 1106. The Court further stressed that the choice of how an accounting should be conducted was properly left to the agency, id. at 1104, and admonished the district court "to be mindful of the limits of its jurisdiction," id. at 1110. The Court emphasized that such jurisdiction would be limited to determining whether actions preparatory to an accounting were "so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Ibid.

3. In 2002, the district court held the Secretary of the Interior and an Assistant Secretary in contempt on the basis of DOI's purported failure to initiate an historical accounting and on claimed inaccuracies in DOI's quarterly reports. Cobell v. Norton, 226 F. Supp. 2d 1 (D.D.C. 2002). The court declared that

"Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place \* \* \* in the pantheon of unfit trustee-delegates." Id. at 161. Based on its contempt findings, the court announced that it would not remand "the matter" to the agency, id. at 152, and further made clear that "the matter" was not only the provision of account statements but the performance of a broad range of trust-related activities. The court thus ordered the government to submit a plan for an accounting as well as a plan for achieving compliance with specified fiduciary obligations to Indians, to be evaluated by the court with a view to additional orders of structural relief. Id. at 148-49.

In July 2003, this Court vacated the contempt ruling, explaining that the record demonstrated that "in her first six months in office Secretary Norton took significant steps toward completing an accounting." Cobell v. Norton, 334 F.3d 1128, 1148 (D.C. Cir. 2003). The Court described the district court's reasoning with respect to the remaining contempt charges as "mystifying," id. at 1149, and "inconceivable," id. at 1150. The Court declined to address, as premature, the contention that the district court had improperly taken over the management of trust reform, indicating that it would consider such an argument only after the court issued its anticipated structural injunction. Id. at 1137-38.

4. Meanwhile, in January 2003, Interior filed its accounting and fiduciary obligations compliance plans pursuant to the district court's directive. The Historical Accounting Plan for Individual Indian Money Accounts ("Accounting Plan") set out the agency's program to complete an accounting consistent with this Court's decision within five years at a cost of \$335 million, subject to congressional appropriations. The Fiduciary Obligations Compliance Plan addressed in detail how Interior was complying and intended to comply with its fiduciary obligations as they related to accounting for trust funds. Interior later submitted, for the court's information, its Comprehensive Trust Management Plan ("Comprehensive Plan"), which included the matters addressed in the Fiduciary Obligations Compliance Plan and addressed the management of trust lands and the tribal trusts as well.

The district court conducted a 44-day trial beginning in May 2003, and in September 2003, it issued a detailed "structural injunction" encompassing both the performance of an accounting and the implementation of a broad program of trust reform. Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003). The injunction was accompanied by an "Historical Accounting" opinion and a "Fixing the System" opinion.

The court announced that it would treat its previous contempt findings as "established" because, in the court's view,

they retained their vitality even though the contempt ruling had been vacated by this Court. Id. at 85. Echoing the contempt ruling, the court explained that it was issuing a structural injunction, rather than remanding to the agency, because it did not trust the Secretary or her subordinates to carry out their official duties. Id. at 225.

The structural injunction sets aside virtually every significant premise of Interior's accounting plan. In addition, it asserts authority over matters ranging from the reorganization of the Department of the Interior to the software to be used for indexing trust documents.

5. Congress responded to the injunction with new legislation enacted as part of the FY 2004 Interior appropriations statute, Pub. L. No. 108-108. In the accompanying conference report, Congress explained that the court-ordered accounting would cost between six and twelve billion dollars, and that the ruling "would require that vast amounts of funds be diverted away from other high-priority programs, including Indian programs." H.R. Conf. Rep. 108-330, at 117 (2003). The conference committee stressed that this "would be devastating to Indian country and to the other programs in the Interior bill." Id. As the committee explained, the expenditure of billions of dollars on an accounting "would not provide a single dollar to the plaintiffs." Id.

The legislation provides that "nothing in the American Indian Trust Management Reform Act of 1994, Public Law 103-412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust," absent new legislation or the lapse of Pub. L. No. 108-108 on December 31, 2004. 117 Stat. 1263.

This Court issued a stay of the structural injunction pending appeal.

#### STATEMENT OF FACTS

##### I. Background.

##### A. The IIM Accounts.

1. The United States holds approximately \$415 million in trust for the benefit of individual Indians. Tr., June 4, 2003, p.m., at 30:1 - 30:6 (Cason) (estimate as of Dec. 31, 2000); see also H.R. Rep. No. 103-778, at 9 (1994) (\$390 million in 1994). These funds are maintained in approximately 260,000 separate accounts. Accounting Plan at 1.<sup>1</sup>

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<sup>1</sup> The United States also holds money in trust for tribes. H.R. Rep. No. 103-778, at 9. The tribal trust accounts are not at issue in this litigation, although they are the subject of other pending lawsuits.

The IIM trust funds include three primary types of accounts: land-based accounts, judgment and per capita accounts, and special deposit accounts. Accounting Plan at III-1.

About 48% of the IIM trust fund money is held in the roughly 200,000 land-based IIM accounts, which contain funds derived from the roughly 10 million acres of land that the United States separately holds in trust for individual Indians. Id. at II-1, III-1. DOI oversees revenue-producing activities on those lands, including oil and gas leases, farming and grazing, and timber harvesting. Id. at II-1. Beneficial ownership of the lands is divided among some four million interests, and Interior must allocate the revenues accordingly and deposit funds in the appropriate IIM accounts. Ibid.

About 36% of the IIM trust fund money is held in the roughly 42,000 judgment and per capita IIM accounts, which contain funds derived from tribal distributions of litigation settlements and tribal revenues, respectively. Id. at III-1. About 16% of the money is held in the roughly 21,500 special deposit accounts, which are temporary accounts for the deposit of funds that cannot immediately be credited to the rightful account holders or owners. Ibid.

2. Management of the IIM funds is extremely complex, and the difficulties are particularly acute for the land-based accounts. The lands that are now held in trust for individual

Indians derive from the period that began in the late nineteenth century when Congress authorized the division of tribal property. Babbitt v. Youpee, 519 U.S. 234, 237 (1997). Pursuant to this "allotment" policy, some Indian land was parceled out to individual tribal members. Ibid. Allotted lands were held in trust by the United States or owned by the allottee subject to restraints on alienation. Ibid. As allottees passed their interests on to multiple heirs, ownership of allotments became increasingly "fractionated." Ibid. Although Congress ended further allotment in 1934, the interests in trust lands already allotted continued to splinter with each generation. Id. at 238.

As a congressional committee observed in 1992, Interior records some fractionated ownership interests to the 42nd decimal point. H.R. Rep. No. 102-499, at 28 & n.94. Accordingly, Interior spends "a great deal of taxpayer money and other resources administering and maintaining tens of thousands of minuscule ownership interests and maintaining thousands of IIM trust fund accounts with little or no activity, and with balances less than \$50." Id. at 28.

#### **B. The 1994 Act.**

In 1992, the House Committee on Government Operations released its "Misplaced Trust" report, which detailed multiple problems with the management of the IIM and tribal trust funds. H.R. Rep. No. 102-499, at 10. The report was the culmination of

several years of investigation and multiple congressional hearings. H.R. Rep. No. 103-778, at 10 (1994).

The committee expressed particular concern over Interior's failure "to provide a full and accurate accounting of the individual and tribal account funds." H.R. Rep. No. 102-499, at 2. The committee noted that, despite repeated congressional directives to provide such an accounting, Interior continued "to move at a snail's pace," ibid., and that Interior "does not - and cannot - conduct periodic or timely reconciliations of the approximately 300,000 accounts in the Indian trust fund to assure they are accurate." Id. at 16. Interior therefore "does not - and cannot - provide accountholders with accurate periodic statements of account balances." Ibid.

The committee observed that, in response to congressional pressure, Interior "finally undertook efforts to begin a meaningful audit and reconciliation process." Id. at 24. As the committee explained, however, Interior's contractor, Arthur Andersen & Co., encountered substantial difficulties in completing the first phase of this audit, and estimated that an audit of the 17,000 IIM accounts selected for the first phase could cost as much as \$12.6 million. Id. at 25. The committee explained that, at that rate, "it might cost as much as \$281 million to \$390 million to audit the IIM accounts at all 93 [Bureau of Indian Affairs] offices." Id. at 26. The committee



stressed that, "obviously, it makes little sense to spend so much when there was only \$440 million deposited in the IIM trust fund for account holders as of September 30, 1991." Ibid. "Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund," the committee advised that "it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund." Ibid. The committee noted that "it remains imperative that as complete an audit and reconciliation as practicable must be undertaken." Ibid.

To address these concerns, Interior commissioned an independent study that determined that reconciling the IIM trust accounts on an account-by-account basis could cost over \$200 million. See 240 F.3d at 1090. Even that expenditure would have yielded a reconciliation of only eighty-five percent reliability. Ibid.

In 1994, Congress enacted the Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239. Section 102(a) provides that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)."

## II. Prior Proceedings.

### A. The Initial District Court Decisions.

1. The plaintiffs in this class action are the beneficiaries of the Individual Indian Money accounts. They brought this suit in 1996, naming as defendants the Secretary of the Interior, the Assistant Secretary for Indian Affairs, and the Secretary of the Treasury. Plaintiffs alleged that the government had breached its trust obligations to the plaintiffs. They sought, among other relief, a decree "ordering an accounting and directing the defendants to make whole the IIM accounts of the class members." Complaint at 27.

The government moved to dismiss the complaint, urging that it sought money damages in excess of \$10,000 and thus could be filed only in the Court of Federal Claims, pursuant to the Tucker Act. Cobell v. Babbitt, 30 F. Supp. 2d 24, 38-39 (D.D.C. 1998). The court rejected this argument based on the representations of class counsel that plaintiffs sought "only an accounting, not a cash infusion" into the IIM accounts. Id. at 40. As the court explained, plaintiffs' counsel represented that "all of the money that should be held collectively in their IIM accounts is already there; the plaintiffs simply contend that the individual account balances are misstated." Id. at 39. "By way of analogy, the plaintiffs liken the status of the accounts to the loss of a checkbook. That is, the money is in the account but the ledger

cannot be properly kept, so the stated balance is incorrect. In the plaintiffs' view, they only seek to balance the checkbook, not add any money to the checking account." Ibid.

Although the court denied the motion to dismiss, it struck allegations that could be read to seek a cash infusion. The court ordered that the following references be stricken from the complaint:

- (1) "[T]he true totals would be far greater than those amounts, but for the breaches of trust herein complained of." Plaintiffs' Complaint ¶ 2;
- (2) "[Defendants] have lost, dissipated, or converted to the United States' own use the money of the trust beneficiaries." Id. ¶ 3(d).
- (3) "and to direct [the defendants] to restore trust funds wrongfully lost, dissipated, or converted." Id. ¶ 4.
- (4) "Failure to exercise prudence and observe the requirements of law with respect to investment and deposit of IIM funds, and to maximize the return on investments within the constraints of law and prudence." Id. ¶ 21(g).

30 F. Supp. 2d at 40 & n.18.

2. In December 1999, the district court dismissed plaintiffs' common law claims with prejudice, and issued a declaratory judgment with respect to plaintiffs' statutory claims. 91 F. Supp. 2d at 28-31, 40-51. The court stressed that "plaintiffs do not even properly seek a common-law claim for an accounting," but instead "seek to enforce their statutory right to an accounting as that phrase is meant under the provisions of [the 1994 Act]." Id. at 27. The court explained that the "statutorily-based claims against the government can be brought under the APA." Id. at 29.

The court held that the 1994 Act required the government to provide plaintiffs an accurate accounting of all IIM funds held for their benefit, without regard to when the funds were deposited in the accounts. Id. at 58. The court further declared actionable a variety of other trust-related matters. For example, the court held that the government had a duty to ensure that its computer and business systems architecture were adequate to render an accurate accounting, and that the staffing of trust management functions was likewise appropriate. Ibid. The court further held that the government had a duty to retrieve and retain all information concerning the IIM trust necessary to render an accurate accounting and to establish written policies and procedures for collecting missing information from outside sources. Ibid. Relying in part on defendants' stipulations, the court declared that the government was in breach of these statutory duties. Ibid.

Having declared the applicable legal obligations and found defendants in violation, the court remanded the matter to allow defendants the opportunity to come into compliance. Ibid. The court retained continuing jurisdiction for five years, and directed defendants to submit quarterly reports setting forth the steps taken to rectify the breaches found. Id. at 58-59.

**B. This Court's Initial Decision.**

In February 2001, this Court largely affirmed the district court's order insofar as it required the government to provide an accounting of funds deposited pursuant to the Act of June 24, 1938. 240 F.3d 1081.

The Court first determined that the district court had jurisdiction under the APA "to compel agency action 'unlawfully withheld or unreasonably delayed.'" Id. at 1095 (quoting 5 U.S.C. 706(1)).

It then rejected the government's contention that the 1994 Act committed to Interior's discretion decisions regarding the extent to which to review transactions that pre-dated the 1994 Act. Id. at 1102. The Court declared that "Section 102 of the 1994 Act makes clear that the Interior Secretary owes IIM trust beneficiaries an accounting for 'all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938.'" Ibid. The Court concluded that "'[a]ll funds' means all funds, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)." Ibid. The Court explained that a "complete historical accounting" of the trust funds is required, reasoning that the government could not give a "fair and accurate accounting of all accounts without first reconciling the accounts, taking into

account past deposits, withdrawals, and accruals." Ibid.  
(emphasis omitted).

Although the Court rejected Interior's contention that the scope of the accounting was entirely committed to its discretion, it emphasized the significant discretion to be afforded to the agency on remand. The Court affirmed what it understood to be the "relatively modest" relief awarded by the district court, explaining that the district court had properly "remand[ed] to the agency for the proper discharge of its obligations" and had required only periodic progress reports. Id. at 1109. The Court stressed that the district court had properly "left open the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate" - decisions that are "properly left in the hands of administrative agencies." Id. at 1104.

The Court also clarified the legal duty at issue, underscoring that the enforceable claim is one for an accounting. The Court observed that the government's duty to provide an accounting "necessarily imposes substantial subsidiary duties" to, for example, "maintain and complete existing records, recover missing records where possible, and develop plans and procedures sufficient to ensure that all aspects of the accounting process are carried out." Id. at 1105. The Court explained, however,

that the "actual legal breach is the failure to provide an accounting, not [the] failure to take the discrete individual steps that would facilitate an accounting." Id. at 1106. The Court thus directed the district court to "amend its opinion on remand to account for this distinction," stressing that the defendants "should be afforded sufficient discretion in determining the precise route they take[.]" Ibid.

Finally, the Court cautioned the district court "to be mindful of the limits of its jurisdiction." Id. at 1110. The Court explained that "[i]t remains to be seen whether in preparing to do an accounting the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting, and the detection of such steps would fit within the court's jurisdiction to monitor the Department's remedying of the delay; beyond that, supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction." Ibid.

**C. Contempt Proceedings.**

1. The district court did not amend its ruling as required by this Court. Instead, it began a process of assuming responsibility for all aspects of trust management.

In November and December 2001, the court ordered the Secretary of the Interior and an Assistant Secretary to show

cause why they should not be held in contempt based on five allegations, denominated "specifications." Specifications 1 and 2 required the defendants to show cause why they should not be held in contempt for allegedly "[f]ailing to \* \* \* initiate a Historical Accounting Project," and "[c]ommitting a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting Project during the period from March 2000, until January 2001." 226 F. Supp. 2d at 12. Specifications 3-5 focused principally on alleged deficiencies in the detailed quarterly reports submitted by Interior.

In September 2002, after a 29-day trial on the contempt charges, the district court issued a 160-page opinion (as published) holding the Secretary and Assistant Secretary in contempt on all five specifications and declaring that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place \* \* \* in the pantheon of unfit trustee-delegates." 226 F. Supp. 2d at 161.

Based on its conclusion that the responsible officials were unfit to perform their duties, the court formalized a broad agenda for trust reform to be supervised by the court in an elaborate sequence of future proceedings. The court explained it would "not simply remand the matter back to the agency again as it did in December of 1999." Id. at 152. Instead, the court directed the Secretary to submit not only a plan for conducting



an accounting of IIM funds, but also a plan to achieve compliance with fiduciary obligations generally, to be evaluated by the court with a view to additional orders of structural relief. Id. at 148-49.

2. In July 2003, this Court vacated the contempt ruling. The Court observed that "in her first six months in office Secretary Norton took significant steps toward completing an accounting," including the creation of the Office of Historical Trust Accounting (OHTA). 334 F.3d at 1148. Indeed, the Court Monitor had recognized that OHTA had "'made more progress \* \* \* in six months [July through December, 2001] than the past administration did in six years.'" Ibid. The Court explained that "[t]hese uncontested facts are inconsistent with a finding that Secretary Norton had failed to comply" with the 1999 order to initiate a historical accounting project, as alleged in the first contempt specification. Ibid. The Court explained that two of the remaining four specifications concerned conduct that took place before Secretary Norton and Assistant Secretary McCaleb had even taken office, and thus could provide basis for contempt. Id. at 1147. The Court described the district court's reasoning with respect to the remaining two contempt specifications as "mystifying," id. at 1149, and "inconceivable," id. at 1150.

In the same ruling, this Court vacated the appointment of Joseph Kieffer as "Court Monitor," observing that the appointment had "entailed a license to intrude into the internal affairs of the Department, which is simply not permissible under our adversarial system of justice and our constitutional system of separated powers." Id. at 1143. The Court declined to address, as premature, the government's contention that the district court had improperly taken over the management of trust reform. Id. at 1137-38. The Court explained that it would consider this issue only after the district court issued its anticipated structural injunction. Id. at 1138.

### **III. Interior's Accounting Plan.**

In January 2003, while the contempt appeal was pending, Interior filed its Historical Accounting Plan for Individual Indian Money Accounts. Although the government disputed the district court's authority to require the submission, Interior invested considerable resources in preparing a detailed accounting plan of the type that would customarily have appeared in the Federal Register rather than in a court filing. The plan was designed to provide an accounting fully consistent with the 1994 Act, as construed by this Court. Accounting Plan at II-1, II-2. It was estimated to take five years to implement, at an estimated cost of \$335 million. Id. at 1. The plan made clear

that implementation was dependent upon sufficient appropriations. Ibid.

To implement this Court's initial decision, Interior's accounting plan was structured to provide, for each IIM account open in 1994 and thereafter, a verified statement of all funds deposited or invested pursuant to the Act of June 24, 1938.

Accounting Plan at III-1.<sup>2</sup>

The accounting itself, like a statement from a bank, is the "listing of all transactions in an IIM account," ibid., - that is, the description of "past deposits, withdrawals, and accruals" in a particular account. 240 F.3d at 1102; see also Accounting Plan, Appendix A (examples of account statements). The account statement would be based on an actual review of records pertaining to the account without the use of statistical sampling. Accounting Plan at III-5.

The audit process is the means for verifying the accuracy of an individual account statement. The plan specified the methods that would be used to audit the different types of IIM accounts. For the approximately 42,000 judgment and per capita accounts, Interior would examine the relevant paper records to audit all of the transactions in each account transaction history. Accounting

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<sup>2</sup> The accounting period would close on December 31, 2000, the date that the relevant Interior offices were fully converted to the Trust Funds Accounting System. Accounting Plan at II-4. Account information recorded since December 31, 2000, would be considered current accounting activity under Interior's plan. Ibid.

Plan at I-1. As of November 2002, Interior had already reconciled more than 14,000 judgment accounts. Ibid.

For the approximately 200,000 land-based IIM accounts, Interior would examine the relevant paper records for all transactions of \$5,000 or more. Ibid. Interior would examine statistically valid samples of the transactions below \$5,000. Id. at 1. Two statistically valid samples of about 80,000 transactions each would be selected from the Electronic Records Era (1985-2000). Ibid. A similar approach would be used to sample transactions from the Paper Records Era (pre-1985). Ibid.

For the approximately 21,500 special deposit accounts, the agency would distribute the funds to the proper owners and close the accounts. Ibid.

#### **IV. The Fiduciary Obligations Compliance Plan And The Comprehensive Trust Management Plan.**

In January 2003, Interior also submitted its Fiduciary Obligations Compliance Plan. The plan addressed in detail the accounting-related "fiduciary duties" that had previously been declared by the court. Interior later submitted, for the court's information, its Comprehensive Trust Management Plan, which incorporated the matters addressed in the Fiduciary Obligations Compliance Plan but also addressed the management of trust lands and the tribal trusts as well. The court ultimately refused to consider the Fiduciary Obligations Compliance Plan and asserted

jurisdiction over all matters addressed in the Comprehensive Plan. 283 F. Supp. 2d at 243-44, 290.

The Comprehensive Plan outlined in general terms the organizational changes proposed by Interior to improve its overall management and supervision of Indian trust funds and assets. Interior produced this plan to guide its own efforts; the plan did not stem from any court order. The plan encompassed virtually every aspect of trust management. It proposed improvements in (1) accounting for trust funds, Comprehensive Plan at 3-7; (2) investing funds, id. at 3-20; (3) maintaining accurate land ownership records, id. at 3-6; and (4) managing trust lands and resources, id. at 3-7. The plan noted that these functions are assigned to multiple components within Interior. Id. at 3-20. As a result, the plan anticipated that a major aspect of reform would involve clarifying the responsibilities of these components and coordinating their activities. Id. at 4-4.

The plan explained that Interior's effort to improve the handling of trust operations would be composed of two major phases. Id. at 5-9. The first phase involved the creation of the "As-Is" model, which would describe the current management of Indian trust funds and assets. Ibid. The second phase would involve the creation of a "To-Be" model, which would provide a detailed description of trust reform. Id. at 5-10.

## V. The Structural Injunction Rulings.

On September 25, 2003, after a 44-day trial, the district court issued the "structural injunction" that is the subject of this appeal, along with two opinions, one addressing the historical accounting and the other addressing trust reform generally.

### A. The Accounting Ruling.

Although the court purported to adopt a "modified version of Interior's accounting plan," 283 F. Supp. 2d at 225, its injunction bears no meaningful resemblance to Interior's plan.

As noted, the Interior plan was designed to provide a statement of account for each IIM account that was open - i.e., that had funds - when Congress enacted the 1994 Act (or thereafter). The court, by contrast, ordered Interior to provide an accounting of all IIM accounts ever in existence, regardless of whether the accounts had been closed (and any funds thus distributed), id. at 169-72, and regardless of whether the account holder had died, id. at 173-75. The court further ruled that Interior must audit the accounts of deceased account holders to ensure that they reflected amounts that were not, but should have been, deposited in an IIM account during the beneficiary's lifetime. Id. at 174-75.

The 1994 Act requires an accounting for funds deposited or invested "pursuant to the Act of June 24, 1938," which was the

statute that authorized the deposit in banks and investment in government securities of Indian trust funds. The court nevertheless ordered Interior to include transactions dating back to 1887, when the land allotment policy began. Id. at 172-73. The court observed that an accounting of pre-1938 transactions was not required under the 1994 Act, but concluded that the Act does not define "the full scope of Interior's fiduciary obligation to account." Id. at 172. In the court's view, an enforceable obligation to account "arose at the very moment that the trust relationship was created." Id. at 173.<sup>3</sup>

The 1994 Act requires Interior to provide daily balances for all funds held in trust for the benefit of an individual Indian that are deposited or invested pursuant to the 1938 Act. The court held that Interior was also required to account for all lands and other assets held in what it deemed "the trust" from "the inception of the trust in 1887 to the present." Id. at 177. The court based its ruling on its understanding of general trust law. Id. at 175-77.

Not all revenues generated from Indian trust lands are paid to and held by Interior for the benefit of an individual Indian. Accounting Plan at II-4. Some revenues are paid directly to the Indian owner of the land by a lessee or other third party. Ibid.

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<sup>3</sup> The court also rejected Interior's plan to treat transactions after December 31, 2000 as current account activity. 283 F. Supp. 2d at 171 n.54.

Interior did not propose to account for such transactions, which were never in its possession and for which it thus has no records. The court concluded that, because Interior has certain fiduciary responsibilities with respect to direct-pay leases and contracts, it must also provide an accounting for the direct payments. 283 F. Supp. 2d at 177-80. The court relied again on its understanding of Interior's "fiduciary duty to account, which predates the 1994 Act." Id. at 180.

As explained above, the Interior plan proposed to present to each account holder a listing of all of the post-1938 transactions for each account that was open in 1994 or thereafter. Accounting Plan at III-1. The accounting itself - akin to a bank statement - is the description of "past deposits, withdrawals, and accruals" in a particular account. 240 F.3d at 1102. To generate this account statement, Interior intended to use data found in its electronic and paper bookkeeping records. Id. at III-5. Sampling was not to be used to generate the account statement. See, e.g., Tr., June 20, 2003, p.m., at 59:20-60:2 (Lasater).

The audit process is the means to verify the accuracy of the account statements. As explained above, Interior intended to examine statistically valid samples of the transactions below \$5000 in the land-based accounts. Accounting Plan at 1.



The district court did not question the accuracy of Interior's proposed sampling method, and recognized that sampling is a widely accepted auditing practice. Nonetheless; it effectively precluded Interior from making use of sampling techniques by defining the accounting to include the verification procedures of an audit. Thus, prior to the audit, Interior would be required to provide documentary support (such as a cancelled check) for each transaction. 283 F. Supp. 2d at 194-96. By conflating the accounting and the audit, the court thus mandated that every transaction, regardless of size, be independently verified.

**B. The "Fixing the System" Ruling.**

In its "Fixing the System" opinion, the court asserted jurisdiction over the broad trust reform initiative proposed in Interior's Comprehensive Plan, which encompasses the management of trust lands and tribal trusts, as well as the management of IIM accounts. The court deemed the plan a "reasonable next step" for complying with the agency's general fiduciary duties, 283 F. Supp. 2d at 282, and ordered Interior to implement it as modified by the court by May 2005, id. at 293.

The court's "modifications" to the plan imposed sweeping new duties on the government. The court declared that the "scope and nature" of Interior's duties to IIM beneficiaries are "coextensive" with the duties of a common law trustee. Id. at

267. It announced sixteen fiduciary duties that it regarded as judicially enforceable, including a duty to make trust property productive. Id. at 267-71. The court ruled that the common law duty with respect to "co-trustees" required the Departments of Treasury and Interior to monitor each other's conduct "to prevent the other from committing a breach of the other's trust duties or to compel the other to redress a breach of trust." Id. at 271. And it ruled that, in managing the IIM trust, Interior must abide by tribal law. Id. at 275. See also id. at 280 (Interior must "correct the problems with the leasing, title, and accounting systems of the IIM trust funds" identified in an amicus brief); ibid. (Interior must "distinguish income from principal" in the historical accounting).

**C. The Structural Injunction.**

In both its accounting and its "fixing the system" rulings, the court declared that it would not remand to the agency for compliance with the legal principles it had announced. 283 F. Supp. 2d at 234, 283. The court explained that it was instead issuing a structural injunction because it did not trust the Secretary or her subordinates to carry out their official duties. In the court's words: "It is not that the Court believes Interior is incapable of formulating an adequate plan for an accounting; rather, it is that the Court has no confidence that Interior is willing to actually implement an adequate

accounting." Id. at 225; see also id. at 283 (the court will not remand to Interior in light of "Interior's extraordinary resistance to the clear mandates of Congress and the courts"). In effect, the court resuscitated the determination that it made on the basis of the contempt trial, that the Secretary and her subordinates are "unfit" trustees and that the court thus must assume responsibility for trust reform. 226 F. Supp. 2d at 161. The court further declared that it was entering a structural injunction because Interior had not, in its view, demonstrated "any progress" in conducting an accounting or in complying with other fiduciary duties. 283 F. Supp. 2d at 230. The court made no reference to this Court's contrary statements in vacating its contempt ruling. The court had not held a trial on those issues, and, as noted, it did not question Interior's ability to implement its own plans.

The court thus transformed all of its legal rulings into the provisions of a lengthy injunction. 283 F. Supp. 2d 287-95. Among other things, the injunction requires Interior to provide an accounting of closed accounts, including the accounts of deceased account holders; of all funds deposited or invested since 1887; of all land and other assets held in trust since 1887; and of all moneys paid directly to trust beneficiaries by third parties. Id. at 288-89. The provisions of the Comprehensive Plan were incorporated wholesale. Id. at 290

("Interior defendants shall implement the Comprehensive Plan, except to the extent that any portion of the Comprehensive Plan is inconsistent with this Order."). The court declared that if any provision of the injunction is susceptible to more than one reasonable interpretation, Interior must either seek clarification or else construe the provision in accordance with "most exacting fiduciary standards" demanded of a trustee. Id. at 287.

Although the court's rulings would radically increase the work associated with a historical accounting project, the court required Interior to adhere to deadlines in its accounting plan. Id. at 291 n.1. For example, the court ordered Interior to complete the accounting of all judgment and per capita accounts by September 30, 2004; of all land-based accounts in the Electronic Records Era by September 30, 2005; and of all land-based accounts in the Paper Records Era by September 30, 2006. Id. at 291-92. The court also ordered Interior to implement its Comprehensive Plan (as modified) by May 31, 2005. Id. at 293. The court indicated that its various deadlines could only be amended on defendants' motion, for good cause. Id. at 294.

To oversee compliance with the structural injunction, the court announced that it would appoint a "Judicial Monitor," to be assisted by "several subordinate officials ('agents')." Id. at 294-95, 220. The court declared that the Monitor shall have all

of the powers of a special master appointed under Rule 53 of the Federal Rules of Civil Procedure. Id. at 294. In addition, the court ordered Interior to provide the Monitor and his or her agents with "unlimited access" to Interior's facilities and "to all information relevant to the implementation of" the court's injunction, so that the Monitor and the agents "may be made cognizant of any failures to comply with the provisions" of the injunction. Ibid. The court declared that the Monitor and his or her agents shall "have the power to conduct confidential interviews with the Interior defendants and any of their subordinates." Ibid. The court indicated that the Monitor's reports on defendants' compliance would be submitted to the court and to the parties on a periodic basis. Id. at 294-95.

#### VI. Public Law No. 108-108.

In the wake of the district court's ruling, Congress made clear that, in its view, the court had seriously misunderstood the governing law, and it amended the law to provide that nothing in statutory or common law should be construed to require the performance of an accounting for IIM accounts.

Noting that the price tag of the structural injunction was estimated at between six and twelve billion dollars, the conference committee observed that Congress had previously "stated in no uncertain terms that it would not appropriate billions of dollars for a historical accounting." H.R. Conf.

Rep. 108-330, at 117. It unequivocally rejected "the notion that in passing the American Indian Trust Management Reform Act of 1994 Congress had any intention of ordering an accounting on the scale of that which has now been ordered" by the district court. Id. at 117-18. The committee observed that "[s]uch an expansive and expensive undertaking would certainly have been judged to be a poor use of Federal and trust resources." Id. at 118. And the committee stressed that it would be "devastating to Indian country" to divert billions of dollars in the manner required by the court's injunction. Id. at 117.

Believing that urgent action was required, Congress, in enacting Interior's appropriations legislation for FY 2004, amended the law to provide:

[N]othing in the American Indian Trust Management Reform Act of 1994, Public Law 103-412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust \* \* \*.

Pub. L. No. 108-108, 117 Stat. 1263. That provision is to remain in effect until enactment of further legislation or until the statute lapses on December 31, 2004. Ibid.

The government sought a stay pending appeal, urging that the structural injunction was without basis when it issued and was, moreover, irreconcilable with Pub. L. No. 108-108. This Court issued a stay.

## SUMMARY OF ARGUMENT

This case has lost its moorings.

In 1994, Congress required the Secretary of the Interior to account for the daily and annual balance of funds held in trust for the benefit of individual Indians.

In 2001, this Court, invoking the Administrative Procedure Act, 5 U.S.C. 706(1), concluded that the government had unreasonably delayed in providing the accounting. At the same time, the Court stressed that the duty to account is the only actionable duty at issue and directed the district court to amend its decision accordingly. The Court admonished the district court to be mindful of the limits of its jurisdiction. That jurisdiction, the Court cautioned, was limited to determining whether the steps taken by the agency on remand were so defective that they would necessarily delay rather than accelerate the ultimate provision of an accounting.

Two years later, the district court issued the structural injunction now on review. In flat disregard for this Court's mandate and the separation of powers, the district court has arrogated to itself the power to supervise and direct all aspects of trust management and trust reform. It has asserted authority over decisions ranging from the reorganization of the Department of the Interior to the software to be used in indexing trust documents. To "fix the system" and to perform an "accounting"

commensurate with that goal, Interior is required to reconstruct virtually every transaction involving land or money that has been held in trust for the benefit of an individual Indian from 1887 onwards. The price tag for the injunction is estimated at between \$6 and \$12 billion.

1. The district court has exercised its continuing jurisdiction in a manner incompatible with this Court's mandate and settled principles of law. As Congress recognized in responding to the structural injunction, its provisions would require the diversion of billions of dollars in a manner that would be "devastating to Indian country" without providing "a single dollar" to the trust beneficiaries. H.R. Conf. Rep. 108-330, at 117.

To respond to the emergency created by the structural injunction, Congress amended substantive law to preclude judicial enforcement of accounting activities - the only proper basis for the court's continuing jurisdiction. But even if Congress had never acted, or if Pub. L. No. 108-108 were to lapse without new legislation, it would be evident that the district court had no authority to enter the structural injunction to further its vision of "trust reform," and that it could not dislodge the officials who are accountable to Congress and the public for the operation of the trust.



2. The district court's failure to heed this Court's mandate would be extraordinary enough under any circumstances. It is even more remarkable because the period following this Court's initial decision has been one of significant progress made possible by a sustained commitment of money and resources. To conclude otherwise, the district court was required to ignore not only this Court's original mandate, but the Court's second decision in this litigation. In 2003, this Court vacated the ruling holding the Secretary of the Interior in contempt and concluding that she was an "unfit" trustee. The Court observed that Secretary Norton had already made more progress toward completing an accounting in her first six months in office than had been accomplished in the previous six years, and stressed that the uncontested facts were inconsistent with a finding that the Secretary had failed to initiate an historical accounting project.

Although its contempt ruling had been vacated, the district court insisted in its structural injunction ruling that the contempt trial afforded a basis for assuming control of agency operations. Indeed, the court expressly declared that it would treat the contempt findings as established. The basis for the judicial takeover is thus a frank refusal to accept this Court's ruling.

3. Even apart from the improper usurpation of executive branch functions reflected in the structural injunction, no legal basis exists for the duties that the injunction purportedly seeks to enforce. The "accounting" ordered by the court has no anchor in the 1994 Act or this Court's initial decision, and can only be understood as part of the district court's effort to overhaul every feature of trust management by requiring reexamination of all past transactions in land or money while dictating every aspect of future trust operations. That many of the duties cited by the court lack even a nominal connection to an accounting underscores the extent to which the court has improperly determined to define and enforce duties without regard to whether Congress has made those duties enforceable or has appropriated funds for their implementation.

4. This Court approved limited continuing jurisdiction for the purpose of ensuring that the agency's implementation of the accounting required by the 1994 Act would not be characterized by further unreasonable delay. The basis for that jurisdiction has long ceased to exist. The agency's commitment of resources has already made possible the reconciliation of over \$50 million in judgment and per capita accounts, and allowed the agency to formulate a detailed plan for completing the accounting for land-based IIM accounts. The district court did not find that the time-frame for completing the accounting was unreasonable, that

the plan would fail to accomplish its stated objectives, or that it would fail in any way to comport with this Court's mandate.

Three years of dedicated effort have resulted in substantial progress and a viable plan for completing that progress. The issue now is whether the accounting plan proposed by Interior, or some other plan, will make best use of limited resources to the maximum benefit of account holders. The \$335 million cost of implementing the Interior plan is dwarfed by comparison to the cost of the structural injunction. Nevertheless, as Congress has cautioned, it is a very large amount to spend to account for IIM funds totaling approximately \$400 million. As Congress explicitly recognized when it enacted Pub. L. No. 108-108, the best use of federal funds is a judgment for the political branches that Congress must address either in the appropriations process or otherwise.

In sum, the court had no legal basis for issuing a structural injunction. Whatever function continuing district court jurisdiction might have been thought to serve in 1999 has vanished five years later. The structural injunction should be vacated and the case remanded with instructions to dismiss.

#### **STANDARD OF REVIEW**

The court's legal rulings are subject to de novo review. Although the decision to enter an injunction is reviewed for abuse of discretion, a court necessarily abuses its discretion

when it fails to apply proper legal standards. Koon v. United States, 518 U.S. 81, 100 (1996). Any pertinent factual findings would be reviewed for clear error.

#### **ARGUMENT**

##### **I. PUB. L. NO. 108-108 DEPRIVES THE STRUCTURAL INJUNCTION OF ANY LEGAL BASIS.**

As we will show below, the structural injunction rests on a profound misunderstanding of the nature of this action and the limits of the court's jurisdiction, and cannot be reconciled with this Court's 2001 unreasonable delay decision or its 2003 contempt decision.

The subsequent enactment of Pub. L. No. 108-108 deprives the injunction of any arguable legal basis. Moreover, at a more general level, the legislation underscores that there is no basis for continuing district court jurisdiction in this case. The issue now is whether Congress will determine to fund the Interior accounting plan, an alternative plan, or otherwise clarify the tasks involved in providing daily and annual balances to accountholders. There is no further role for the district court, and the case should be dismissed.

##### **A. The New Legislation Removes Any Legal Basis For The Structural Injunction.**

1. This is an action to compel an accounting for funds in IIM accounts. The district court's declaratory judgment ruling

in 1999, and this Court's 2001 decision on appeal, make that fundamental point unmistakably clear.

When the district court issued its 1999 declaratory judgment, it dismissed plaintiffs' common law claims. The remaining claims, the court explained, were based on plaintiffs' attempt "to enforce their statutory right to an accounting as that phrase is meant under the provisions of [the 1994 Act]." 91 F. Supp. 2d at 27. Unlike the common law claims, plaintiffs' "statutorily-based claims against the government can be brought under the APA." Id. at 29.

On appeal, this Court concluded that the district court had subject matter jurisdiction under the APA "to compel agency action 'unlawfully withheld or unreasonably delayed.'" 240 F.3d at 1095 (quoting 5 U.S.C. 706(1)). Although the district court had already dismissed plaintiffs' common law claims, the Court further required the district court to amend its ruling to reflect the fact that the only "actual legal breach" at issue "is the failure to provide an accounting, not [the] failure to take the discrete individual steps that would facilitate an accounting." Id. at 1106. The Court admonished the district court "to be mindful of the limits of its jurisdiction," id. at 1110, noting that the only basis for retaining jurisdiction over the case was to determine whether Interior's actions "would

necessarily delay rather than accelerate the ultimate provision of an adequate accounting[.]” Ibid.

2. Congress has undoubted authority to amend the law that governs the administration of IIM accounts and related trust matters and provides the basis for the forward-looking relief that plaintiffs seek in this litigation. Miller v. French, 530 U.S. 327, 344 (2000); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 232 (1995); Robertson v. Seattle Audubon Soc’y, 503 U.S. 429, 432-35, 440 (1992). In Pub. L. No. 108-108, Congress addressed the legal basis of the only claim remaining in this suit, and provided that nothing in governing law shall be construed or applied to require Interior to commence or continue an historical accounting for IIM accounts until further action by Congress or until the statute lapses.

The statute provides:

[N]othing in the American Indian Trust Management Reform Act of 1994, Public Law 103-412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until the earlier of the following shall have occurred:

(a) Congress shall have amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or

(b) December 31, 2004[.]

117 Stat. 1263. Current law thus does not require Interior to perform an historical accounting. Accordingly, even assuming that the structural injunction had a basis in law at the time it was issued, that basis has now been removed.

3. Plaintiffs have suggested that the new legislation has no bearing on many aspects of the structural injunction because many features of the injunction have no relation to the performance of an accounting, but relate only to "institutional trust reform." Petition for Rehearing, at 1-3.

It is certainly true that the district court far exceeded the limits of its jurisdiction in issuing the structural injunction, and that, apart from the injunction's other defects, significant portions of the ruling have little or no relation to the only actionable duty in this case, the duty to furnish account statements to IIM beneficiaries.

It is equally true, however, that plaintiffs cannot seize upon the very scope of the district court's error to defeat the legislation that responds to its ruling. The district court's 1999 ruling and this Court's 2001 opinion left no claim in this suit other than a claim for an accounting of the IIM accounts, and Congress would have understood as much when it enacted Pub. L. No. 108-108.

Nor is there any doubt that Congress intended to forestall implementation of the entire injunction. The conference

committee explained that Congress had no intent to provide the "between \$6 billion and \$12 billion" that was the estimated cost of complying with the court-ordered accounting. H.R. Conf. Rep. 108-330, at 117. As the Declaration of James E. Cason, the Associate Deputy Secretary of the Interior, makes clear, that is the estimated cost of complying with the injunction in its entirety. Motion For Stay Pending Appeal, Exh. A, at 5.

The committee stressed that such an expenditure "would require that vast amounts of funds be diverted away from other high-priority programs, including Indian programs," in a manner that "would be devastating to Indian country." H.R. Conf. Rep. 108-330, at 117. And the committee observed that the expenditure of billions required by the court "would not provide a single dollar to the plaintiffs." Ibid. While the committee reaffirmed that "fixing trust systems prospectively is a high priority," ibid., it made clear that "a legislative solution may be the only way to resolve these trust reform issues," id. at 118.

Thus, Congress amended the governing law in order to give itself time "to consider the issues and tradeoffs at stake." Ibid. At the same time, Congress "limited the funds available to the Department for historical accounting to those activities that need to be accomplished and can be accomplished in the short-term." Ibid.; see Pub. L. No. 108-108, 117 Stat. 1263 (amounts "not to exceed \$45,000,000 shall be available for records



collection and indexing, imaging and coding, accounting for per capita and judgment accounts, accounting for tribal accounts, reviewing and distributing funds from special deposit accounts, and program management of the Office of Historical Trust Accounting, including litigation support").

Plaintiffs' attempt to avoid the impact of Pub. L. No. 108-108 only highlights the extent to which the district court has, in fact, issued an order without anchor the in duty to account that is the only legal duty at issue in this case. Even apart from the new legislation, such an order could not stand.

**B. Even Apart From The Statute's Controlling Legal Force, Its Enactment Highlights The Impropriety Of A Structural Injunction And Of The Court's Continuing Jurisdiction.**

Even if Pub. L. No. 108-108 were to lapse without new legislation, the passage of the Act and the concerns addressed by Congress underscore two crucial points developed in greater detail in later sections of our argument: the impropriety of a structural injunction and the lack of any basis for the district court's exercise of continuing jurisdiction in this case.

The legislation illustrates precisely why district courts do not issue structural injunctions that transfer responsibility for the operation of federal programs from the political branches to the courts. While the court had jurisdiction under 5 U.S.C. 706(1) to direct Interior to take final agency action - i.e., to produce statements of account for individual account holders - it

may neither direct the steps that the agency must take to do so nor assume the agency's responsibilities and redefine its legal obligations so as to direct the expenditure of billions of dollars never appropriated by Congress. The management of trust matters, including the performance of accounting, is committed to politically accountable executive branch officials who are, in turn, subject to the oversight of Congress and to Congress's determination of spending priorities.

The legislation also underscores that the rationale for the district court's continuing jurisdiction no longer exists. As set out in detail below, there can be no serious question that Interior has responded to the initial rulings of the district court and this Court. The issue has long since ceased to be one of delay. The question now is not whether Interior is making progress in producing the statements of account required by the 1994 Act, but whether the appropriation of funds required for a particular accounting methodology is justified by the benefits to account holders, a judgment that in one form or another must be made by Congress. Indeed, Congress has recognized that "it is time for Congress to act to delineate the exact scope of the historical accounting called for in the 1994 Act, or to develop alternative methods of resolving the current dispute." H.R. Conf. Rep. 108-330, at 118. As this Court has stressed, determinations of this sort are "'for the political branches to work out.'" The Mashpee Wampanoag Tribal Council v. Norton, 336

F.3d 1094, 1101 (D.C. Cir. 2003) (quoting In re: Barr Labs., Inc., 930 F.2d 72, 75 (D.C. Cir. 1991)). The district court has no further role in this matter.

**II. BY ISSUING A STRUCTURAL INJUNCTION, THE DISTRICT COURT CONTRAVENED THE MANDATES OF THIS COURT AND SETTLED LIMITS ON JUDICIAL AUTHORITY.**

As we show below at Point III, the duties that the structural injunction purports to enforce are without legal basis. As a threshold matter, however, it is plain that the district court departed from fundamental principles governing judicial review of executive branch action when it subjected the management of Indian trust programs - including but not limited to the performance of an accounting - to the requirements of a complex structural injunction to be enforced by the court and a team of court monitors.

**A. A District Court May Not Assume Control Of An Executive Branch Agency To Effect Wholesale Reform.**

The courts have power to review agency action and to declare it unlawful or inadequate pursuant to the standards articulated in the APA. But "that authority is not power to exercise an essentially administrative function." Federal Power Comm. v. Idaho Power Co., 344 U.S. 17, 21 (1952). The "guiding principle \* \* \* is that the function of the reviewing court ends when an error of law is laid bare." Id. at 20.

Nor may a court insert itself into the agency's decision-making process by imposing additional procedural - much less, substantive - requirements on agencies beyond those mandated by statute. As the Supreme Court stressed in Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978), the judiciary may not dictate to agencies the methods and procedures of needed inquiries on remand because "[s]uch a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" Id. at 545 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

These principles apply regardless of whether an agency has unquestionably delayed in taking appropriate action. Mashpee, 336 F.3d at 1100-01; Barr Labs., 930 F.2d at 74-75. Under 5 U.S.C. 706(1), a court may compel an agency to take action that, once taken, would be final agency action. The court may not, however, seek to control the processes by which an agency fulfills its congressionally-mandated duty to take the final agency action that the court has compelled. See United States v. Saskatchewan Minerals, 385 U.S. 94, 95 (1966) (vacating order that precluded ICC from receiving evidence on remand). Further review must await final agency action, which is evaluated under 5 U.S.C. 706(2). These limitations reflect the respective allocation of powers to the executive and judicial branches.

Indeed, even in exceptional cases in which an agency has flagrantly disregarded a congressionally-mandated deadline, the

appropriate judicial role extends no further than to retain jurisdiction over a case and require periodic progress reports until the agency has completed its final action. See United Mine Workers of Am. Int'l Union, 190 F.3d 545, 556 (D.C. Cir. 1999) (retaining jurisdiction and requiring semi-annual progress reports from the Mine Safety and Health Administration until it issued final regulations); Global Van Lines, Inc. v. ICC, 804 F.2d 1293, 1305 n.95 (D.C. Cir. 1986) (recognizing agency "discretion to determine in the first instance" how to bring itself into compliance); Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 81 (D.C. Cir. 1984) (retaining jurisdiction pending FCC's resolution of underlying issues).

Perhaps most clearly of all, a court cannot, consistent with the separation of powers, order "wholesale improvement of [a] program by court decree, rather than in the offices of the Department [of the Interior] or the halls of Congress, where programmatic improvements are normally made." Lujan v. National Wildlife Fed'n, 497 U.S. 871, 891 (1990). As the injunction in this case illustrates dramatically, judicial takeovers of this kind trench on the authority of politically accountable executive officials to implement the law, and the power of Congress to determine whether and to what extent particular activities should be funded.

**B. This Court Made Clear That The District Court's Role Was Limited To Determining Whether Actions To Produce An Accounting Were So Defective As To Constitute Additional Unreasonable Delay.**

1. The district court's disregard of these axioms is particularly extraordinary because this Court's 2001 decision left no doubt of their application to this case. Indeed, the Court quoted the language from Lujan cited above in making clear that plaintiffs' suit could not serve as a vehicle for addressing general defects in trust management. 240 F.3d at 1095.

The Court also left no doubt as to the precise legal claim at issue and the limits of the district court's continuing jurisdiction. The Court noted that deficiencies in areas such as computer management might be evidence of delay in providing an accounting, but stressed that the "actual legal breach is the failure to provide an accounting, not [the] failure to take the discrete individual steps that would facilitate an accounting." Id. at 1106. The Court directed the district court to "amend its opinion on remand to account for this distinction." Ibid.

This Court affirmed what it understood to be "relatively modest" relief, id., at 1109, explaining that the district court had properly "remand[ed] to the agency for the proper discharge of its obligations" and had required only periodic progress reports, ibid. Even so, the Court emphasized that "we expect the district court to be mindful of the limits of its jurisdiction."

Id. at 1110. The Court observed that it was possible that the agency might take steps "so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting, and the detection of such steps would fit within the court's jurisdiction to monitor the Department's remedying of the delay." Ibid. The Court stressed that, "beyond that, supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction." Ibid.

The Court's admonition is particularly striking because the district court order on review had apparently subscribed to many of the principles stressed in this Court's opinion. As discussed, the district court had dismissed plaintiffs' common law claims. 91 F. Supp.2d at 28-31. It had framed the issue as plaintiffs' attempt "to enforce their statutory right to an accounting as that phrase is meant under the provisions of [the 1994 Act]," id. at 27, and had explained that statutory claims would be heard within the APA framework, id. at 29. Moreover, the district court had quoted the same language from Lujan later quoted by this Court, and declared: "Despite their frustrations, however, plaintiffs must remember that they have brought a lawsuit. As in all cases, the judicial branch must consider not only the parties' rights and correlative obligations, but also constitutional concerns such as separation of powers." Id. at 53-54. That this Court nevertheless felt it necessary to

underscore the limits on the district court's continuing jurisdiction should have left no doubt as to the proper judicial role on remand.

The district court did not amend its opinion as this Court had required and has never explained how its subsequent actions can be reconciled with the Court's explicit admonitions as to the limits of its jurisdiction.

**C. The District Court's Unprecedented Assertion  
Of Jurisdiction Is Made Even More Remarkable  
Because It Is Premised On The Vacated  
Contempt Ruling.**

1. As we have shown, no set of circumstances could have justified the district court's decision to issue a structural injunction, or to extend its authority to trust matters with little or no connection to an accounting. That the injunction is premised on the February 2002 contempt trial renders the court's unprecedented assumption of power even more remarkable.

After that trial and on the basis of its contempt findings, the court concluded that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place \* \* \* in the pantheon of unfit trustee-delegates." 226 F. Supp. 2d at 161. The court explained that because "[t]he Department of Interior, as the trustee-delegate for the United States, has utterly failed to manage this trust properly," it would issue a "structural injunction." *Id.* at 146 n.154. Under no circumstances would it "remand the matter back to the agency."



Id. at 152. The court declared that, if Interior officials, "including Secretary Norton, feel that as a result of this Court's ruling they are unable or unwilling to perform their duties to the best of their ability, then they should leave the Department forthwith." Id. at 133.

The court never departed from that conclusion. In issuing the structural injunction, the court declared that it would treat its previous contempt findings as "established." 283 F. Supp. 2d at 85. The court confirmed that it would be asserting jurisdiction over trust management generally, and that it would supervise all aspects of trust management directly rather than remand to the agency because it did not trust the Secretary or her subordinates to carry out their official responsibilities. In the court's words, if it "simply remands to Interior, there will be no attempt to reform the trust, no attempt to 'fix the system,' only the performance of a so-called 'accounting,' the scope and nature of which have already been determined by Interior." Id. at 234.

2. Even if the contempt ruling had not been vacated by this Court, the contempt findings could not possibly have supplied a basis for the judicial takeover of agency operations that occurred in September 2003. The contempt trial was not, by its terms, intended to examine Interior's execution of its trust responsibilities generally. Nor was it intended to assess the

progress that the agency had made in performing an accounting as of February 2002, when the contempt trial ended.

Instead, as this Court has explained, the question at the contempt trial was whether sanctions should be imposed for conduct variously described as "contempt" or "fraud." 334 F.3d at 1146-47. Only the first two of the five contempt "specifications" concerned the steps the agency had taken to initiate an historical accounting. Id. at 1135.<sup>4</sup> Even with regard to those specifications, the district court made clear that it would not consider evidence of steps Interior had taken more than eighteen months after the court's 1999 declaratory judgment ruling, that is, progress made after July 10, 2001. See 226 F. Supp. 2d at 114-15. The court thus dismissed, as too recent, evidence of the steps that Secretary Norton had taken by July 2001, i.e., within six months of having taken office and

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<sup>4</sup> Specifications 1 and 2 required the defendants to show cause why they should not be held in civil contempt for "[f]ailing to \* \* \* initiate a Historical Accounting Project," and for "[c]ommitting a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting Project during the period from March 2000, until January 2001." 334 F.3d at 1135. Specifications 3 and 4 involved allegedly misleading statements contained in Interior's voluminous quarterly reports regarding progress on the TAAMS computer system. Id. at 1135, 1148-49. The fifth specification touched upon various statements made to the court regarding computer security, including statements made by government lawyers in litigation proceedings to the effect that, in the government's view, certain of plaintiffs' arguments were without merit. Id. at 1135, 1149-50.

within six months of this Court's initial decision. Ibid.; see also 334 F.3d at 1147.

Thus, the contempt trial did not even purport to examine the agency's progress with regard to an accounting as of February 2002, much less its progress at the time the structural injunction was issued. Nor did the contempt trial examine the management of Indian trusts generally.

3. The district court's belief that it could ignore this Court's admonitions about the reach of its jurisdiction is inexplicable. That it would regard the type of evidence considered at the contempt trial as justifying a judicial takeover is likewise remarkable. The court's further decision to pay no heed to this Court's decision vacating the contempt ruling marks three degrees of separation from sound analysis.

In its 2003 decision, this Court vacated the contempt ruling, leaving no doubt that the record provided absolutely no basis for calling into question the good faith or reasonable efforts of the present Secretary. To the contrary, the Court declared that

the district court's findings clearly indicate that in her first six months in office Secretary Norton took significant steps toward completing an accounting. By June 2001 the Secretary had contracted with EDS, a national consulting firm, to evaluate the status of the TAAMS project, and by November 2001 the Department had proposed a reorganization plan aimed at eliminating the problems EDS had identified. In July 2001 Secretary Norton created the Office of

Historical Trust Accounting, which has since made significant progress toward completing an accounting. Hence, the Court Monitor stated in his Fifth Report, "[t]here is no doubt the OHTA has made more progress \* \* \* in six months [July through December, 2001] than the past administration did in six years."

334 F.3d at 1148 (citations omitted).

In examining the allegedly misleading statements regarding the Interior computer system, the Court observed that it was "mystifying" for the district court to hold that later reports calling attention to shortfalls in earlier ones "lead to the conclusion that those [prior] reports were intentionally false and misleading." Id. at 1149. Similarly "inconceivable" was the conclusion, made in regard to the matter of computer security, that a fraud judgment could be founded on a government attorney's argument "in an adversarial proceeding that an adversary's motion critical of the Department was 'without merit.'" Id. at 1150.

It is unclear how the district court could treat the findings of the contempt trial as "established" after its ruling had been vacated. 283 F. Supp. 2d at 85. Even more crucially, however, this Court's ruling deprived the decision to issue a structural injunction of whatever rationale it might have possessed. This Court made clear that "the district court's findings clearly indicate that in her first six months in office Secretary Norton took significant steps toward completing an accounting," and that the "uncontested facts are inconsistent

with a finding that Secretary Norton failed to comply" with the district court's 1999 order to initiate an historical accounting project.

The district court was not free to ignore this ruling and to continue to insist that "Interior has not demonstrated that it has made any progress, either in complying with its obligation to conduct an accounting for IIM beneficiaries or in complying with its other fiduciary obligations." 283 F. Supp. 2d at 230. This Court had established that precisely the opposite was true. (To buttress its assertion that no progress had been made, the court quoted from this Court's initial opinion in preference to the decision that considered the evidence of progress following the remand. Id. at 230-32.)

The court had no basis for disregarding both of this Court's decisions and assuming control of the management of all Indian trust operations.

**D. The Impropriety Of The Structural Injunction  
Is Underscored By The Plan To Police Interior  
Using A "Monitor" And A Team Of "Agents."**

The full extent of the court's intrusion into the conduct of an executive branch agency is highlighted by the establishment of a Monitor and a team of agents to police the implementation of the structural injunction. See 283 F. Supp. 2d at 294. The "Judicial Monitor" is to have all of the powers of a special master appointed under Rule 53 of the Federal Rules of Civil Procedure. Ibid. The Monitor is to be assisted by "several

subordinate officials ('agents')." Ibid. Interior is to provide the Monitor and his or her agents with "unlimited access" to Interior's facilities and "to all information relevant to the implementation of" the court's injunction, so that the Monitor and the agents "may be made cognizant of any failures to comply with the provisions" of the injunction. Ibid. The Monitor and his or her agents "shall have the power to conduct confidential interviews with the Interior defendants and any of their subordinates." Ibid.

These unprecedented provisions dispense with the last suggestion that separation of powers principles would limit the district court's authority. Every action of every Interior employee is to be evaluated by a team of court agents for compliance with detailed requirements and broad commandments to meet fiduciary obligations. The executive branch is to be given no control over its employees and enjoy absolutely no confidentiality. As we have shown, the structural injunction would wildly exceed the district court's authority even absent such an enforcement mechanism. The enforcement mechanism leaves no doubt that the district court has assumed authority to establish priorities, direct the expenditure of funds without regard to appropriations, and subordinate the Department of the Interior to the oversight and directives of a monitor and agents.

The enforcement scheme is particularly extraordinary in view of the court's previous efforts to invest a monitor with far-

ranging oversight authority. The government had initially agreed to the appointment of Joseph Kieffer as monitor for a period of a year. It objected to an extension of his tenure when it became clear that the monitor was engaged on an extraordinary mission to examine and evaluate the day-to-day operations of government and to proclaim the existence of contemptuous conduct on the basis of evidence never presented on the record by the parties. As this Court observed in vacating Kieffer's appointment, "the district court's appointment of the Monitor entailed a license to intrude into the internal affairs of the Department, which simply is not permissible under our adversarial system of justice and our constitutional system of separated powers." 334 F.3d at 1143. The Court stressed that the monitor had been vested with an "investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." *Id.* at 1142.

The structural injunction would institutionalize on a grand scale an intrusion that violates basic precepts of the separation of powers. In this respect, as in others, the structural injunction disregards this Court's rulings.

**III. EVEN APART FROM THEIR INCORPORATION INTO A  
STRUCTURAL INJUNCTION, NO LEGAL BASIS EXISTS  
FOR THE DUTIES PROCLAIMED BY THE DISTRICT COURT.**

As we have shown, the district court acted without authority in issuing a "structural injunction" and arrogating to itself the control of an executive branch agency. As we discuss in this

section, quite apart from their incorporation into a structural injunction, the duties declared by the district court are without foundation.

**A. In Determining The Existence Of Legally Enforceable Duties, The Court Improperly Ignored This Court's Mandate and Wrongly Incorporated Wholesale The Common Law Duties Of Private Trustees.**

As a threshold matter, the court made no effort to reconcile the diverse legal duties that are the subject of its ruling with this Court's specific requirement that the court amend its declaratory judgment to reflect that the only actionable duty at issue is the duty to produce an accounting. Nor did the court explain how the multiple non-statutory duties discovered in its opinion comport with its earlier dismissal of plaintiffs' common law claims, and its declaration, in its 1999 decision, that the remaining "statutorily-based claims against the government can be brought under the APA." 91 F. Supp. 2d at 29.

Instead, the court relied heavily on statements in this Court's 2001 opinion observing that the 1994 Act reflected a preexisting trust duty. See, e.g., 334 F.3d at 1095. The district court apparently believed that such statements freed it to revive the common law claims it had dismissed with prejudice and to oversee trust management generally to ensure compliance with duties that, in the court's view, were "coextensive" with the duties of a common law trustee. 283 F. Supp. 2d at 267.



The court was fundamentally mistaken. This Court concluded that the reasonableness of the government's response in implementing the 1994 Act should take into account its preexisting trust responsibilities and should not be measured solely on the basis of a foreshortened time frame commencing in 1994. The Court never suggested, however, that such "preexisting" fiduciary obligations were independently enforceable, only that they informed the question of whether the agency had unreasonably delayed in implementing the 1994 Act. And the Court nowhere suggested that common law duties unrelated to the performance of the accounting would have any role in the case (which, would, indeed have been an extraordinary suggestion inasmuch as the common law claims had already been dismissed). To the contrary, as noted, the Court emphasized that the only actionable duty was the duty to perform an accounting.

The district court was equally wrong to declare the government's duties "coextensive" with the duties of a common law trustee. While common law trust duties may inform the interpretation of statutory mandates, they do not provide an independent basis for judicial action, nor can they be mechanically transposed on a statutory trust. The differences between the Indian trusts and a common law trust are manifest. The expenses of administering a common law trust are paid out of the trust itself. Restatement of Trusts (Second) § 244 (1957). By contrast, the expense of administering the IIM trusts is paid

out of appropriations. 283 F. Supp. 2d at 258. Questions of prudent administration are thus committed in the first instance to the agency, subject to congressional oversight. Mashpee, 336 F.3d at 1101 ("Such budget flexibility as Congress has allowed the agency is not for us to hijack.") (quoting Barr Laboratories, 930 F.3d at 76).<sup>5</sup>

In transforming the agency's responsibilities, the district court added billions of dollars to the \$335 million cost of the Interior Accounting Plan, a cost that was arguably already in excess of congressional expectations. The court proclaimed that cost could be ignored because the court's approach was consistent with the preferences of trust beneficiaries, 283 F. Supp. 2d at 196, and further declared that "insufficient appropriations" cannot "modify the underlying substantive obligations owed by a trustee," 283 F. Supp. 2d at 262. But a district court has no power to impose obligations that are grounded neither in a statute or in the Constitution and announce that the obligations must be performed regardless of the availability of appropriated funds. Indeed, the availability of appropriations - especially where Congress acts with full awareness of the situation - serves to define what steps the Secretary may reasonably be expected to

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<sup>5</sup> See also Trial Tr. V. 19 at 68:11-15, 69:2-12 (testimony of Yale Law Professor John Langbein) (highlighting other differences between the Indian trusts and a common law trust).

take in administering IIM accounts. Mashpee, 336 F.3d at 1100-01; see also Nevada v. United States, 463 U.S. 110, 128 (1983).

Congress observed in 1992 and reaffirmed with Pub. L. No. 108-108 that the scope of an accounting depends on the availability of funds, and that Congress must determine the level of that funding in view of the benefit to be derived. Thus, the Misplaced Trust report emphasized that the goal was "as complete an audit and reconciliation as practicable." H.R. Rep. No. 102-499, at 26 (emphasis added); see also ibid. ("Obviously, it makes little sense" to audit IIM accounts at a cost of \$281 to \$390 million "when there was only \$440 million deposited in the IIM trust fund for account holders as of September 30, 1991.").

It is for Congress to determine the substantive obligations of the federal government, the appropriations devoted to their implementation, and the extent to which any of these obligations is judicially enforceable. That Congress has neither created a right of action to enforce an asserted duty nor appropriated funds for the performance of that claimed duty is not irrelevant: it is dispositive.

**B. The "Accounting" Required By The District Court Is Without Basis In The 1994 Act And Forms Part Of The Court's Improper Attempt To "Fix The System."**

The "accounting" mandated by the district court is not an accounting with any grounding in the 1994 Act or in common law principles that might inform the interpretation of the statute.

Instead, the district court made clear that the accounting should be interpreted as a means to what it understood to be the real goal of the litigation: to "fix the system." Thus, the court explained that "if this Court simply remands to Interior, there will be no attempt to reform the trust, no attempt to 'fix the system,' only the performance of a so-called 'accounting,' the scope and nature of which have already been determined by Interior." 283 F. Supp. 2d at 234.

In rejecting the Interior plan, the court re-defined an accounting in a way that would (in its view) advance the larger purpose of "fixing the system," by requiring Interior to revisit virtually every transaction related to land or funds since 1887. That is plain by reference to some of the principal features of the court's plan. The court plan requires:

- An accounting for every transaction involving money held in trust for an individual Indian since 1887.
- An accounting for all accounts that have ever existed, even if the account holders died decades ago.
- An accounting for all transactions in land held in trust for individual Indians dating back to 1887.
- An accounting for monies that were never held in trust at all, but were paid directly to Indians by third parties.
- Actual verification of every transaction, regardless of size and date, with no use of statistical sampling.
- Duties defined without regard to statutes of limitations.

The Interior plan would require the agency to account for roughly 30 million transactions and verify roughly 500,000 of those transactions. Cason Decl. 6. By contrast, the court's order would require Interior to account for more than 60 million IIM transactions and to verify each transaction individually. Ibid. Virtually all of the transactions added by the court would pre-date the electronic records era and thus would require resort to paper records, an exceedingly labor-intensive process. Ibid.

The vast discrepancy between the appropriations contemplated by Congress and those required by the district court reflects the crucial feature of this litigation following this Court's initial decision: the district court has acted in excess of its jurisdiction and without reference to statutes that create judicially enforceable duties. The court had no basis for questioning the parameters of the agency's planned accounting in advance of final agency action. In any event, even a cursory examination of the court's requirements demonstrates the extent to which they are without legal basis.

**1.     Accounting For Closed Accounts And For  
All Transactions Dating Back to 1887.**

Under the Interior plan, the agency would provide account statements to current account holders (and holders of accounts open as of 1994) for funds deposited or invested subsequent to 1938.

By contrast, the court required that Interior provide an accounting for all accounts that have ever been in existence, including those that have been closed for decades. 283 F. Supp. 2d at 169-73. That ruling cannot be squared with the plain terms of the 1994 Act, which requires that Interior account for "the daily and annual balance of all funds held in trust" for the benefit of individual Indians. Closed accounts have no balance, and no purpose is served by making them part of an accounting. Once an account is closed, the trust relationship is ended and trust duties cease. Current beneficiaries cannot demand an accounting on behalf of former account holders.

Indeed, the clear premise of the Misplaced Trust report was that an accounting would be performed only for the roughly 300,000 open accounts. H.R. Rep. 102-499, at 26 ("it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund"); see also id. at 7, 16, 23. The district court chose to dismiss this report, reasoning that it was not a part of the 1994 Act's legislative history because it pre-dated the Act by two years. 283 F. Supp. 2d at 170 n.53. But as the court had previously recognized, Congress passed the 1994 Act "[b]ased largely on the findings made in Misplaced Trust." 91 F. Supp. 2d at 13; see also H.R. Rep. No. 103-778, at 10 (1994).

The requirement that Interior account for transactions back to 1887 is similarly inexplicable. The 1994 Act provided for an accounting of funds "deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." Whatever the scope of Interior's accounting responsibility, no reading of the statute could plausibly compel an accounting of transactions that pre-date the 1938 statute.

## **2. Accounting For Lands.**

The 1994 Act requires an accounting for funds deposited or invested pursuant to the 1938 Act. The structural injunction requires a description of all land assets "held in the trust, from the inception of the trust in 1887 until the present." 283 F. Supp. 2d at 177. The court believed that the lands were part of the IIM "corpus" and thus must be included in the accounting. Id. at 175-77.

The ruling finds no basis in the 1994 Act's text and its reasoning is seriously confused. Contrary to the district court's understanding, there is no unitary "Indian trust." In particular, the land held in trust for an individual Indian and funds held in trust for an individual Indian are distinct. Although there may be relationships between the trusts - income from revenue-producing trust lands held for the benefit of an individual Indian are often deposited in an IIM accounts for that individual - about one half of the IIM accounts contain no land-based revenue, and many trust lands are not revenue-producing at

all. Indeed, as Interior's plan explains, there are roughly four million ownership interests in trust lands, Accounting Plan at II-1, but only 200,000 land-based IIM accounts, id. at 1.

As a practical matter, the court's ruling would require Interior to reconstruct the entire "fractionation" process that, as the Misplaced Trust report observed, has yielded land ownership interests recorded to the 42nd decimal point. H.R. Rep. No. 102-499, at 28; see also id. at 28 n.94 ("One 320-acre tract at the Standing Rock reservation has 542 owners, including 531 individual Indians and 11 tribal or other owners. The land size equivalent of the smallest ownership interest in that tract is smaller than the dimensions of this page [0.35 square feet or 7.1 inches by 7.1 inches]."); Phase I Trial, Def. Exh. 51 (chart illustrating fractionation process). This endeavor (assuming that it is even feasible) would dwarf the task of auditing the transactions in the IIM accounts.

Moreover, even if there were a basis to require an accounting of current trust lands, of the 20-40 million acres that were allotted between 1887 and 1934, only about 10 million acres are owned by individual Indians today. Cason Decl., at 8. Thus, the court would have Interior devote extraordinary resources to document the history of lands no longer held in trust. Ibid.



### 3. Non-conclusiveness Of Probate Determinations.

The court has further required Interior, in reconstructing more than a century of various transactions, to audit accounts that have gone through probate.

The court apparently believed that the presumptive validity of probate proceedings extends only to the determination of descent, i.e., the identification of heirs and the share of the estate each heir should receive, and not to the separate question of whether the inventory of the estate was complete and accurate. The court explained that probate would not, for example, account for \$500 that a deceased beneficiary should have received during his lifetime but did not. 283 F. Supp. 2d at 174-75. In other words, the court's ruling requires that Interior not only verify the transactions that took place in the accounts of deceased account holders, but also ascertain whether there were transactions that should have taken place, so that Interior can then re-determine amounts that should have been entered into the accounts of their heirs.

Interior's probate proceedings afford heirs the opportunity to contest Interior's determination of the estate's holdings. 43 C.F.R. 4.271. The determination at the end of probate is final. Indeed, the whole point of such proceedings is to dispose with finality of all assets, claims, and issues concerning a decedent and his estate. It is no part of an accounting of funds held in trust for current beneficiaries to look behind such a final

determination of the interests of a decedent, even a predecessor in interest. Indeed, because there is no requirement that funds held in trust in the decedent's IIM account be paid into IIM accounts held in trusts for his heirs - rather than being passed to the heirs outright - a discovery that a decedent did not receive a payment into his IIM account that should have been made does not mean that an heir's IIM trust account should contain a greater balance.

In any event, neither the 1994 Act nor this lawsuit provides a means to adjust the amounts in IIM accounts to compensate for payments that were never made into those accounts in the first place (whether the accounts were closed long ago or remain open at present). Such a process is not an accounting for funds paid into and out of an IIM account, but a damages claim for funds improperly withheld. And as the district court recognized long ago, plaintiffs properly seek "only an accounting, not a cash infusion" into the IIM accounts. 30 F. Supp. 2d at 40.

#### **4. Statistical Sampling.**

It has long been apparent that without employing statistical sampling to verify account transactions, the cost of the overall project would be far more prohibitive than the \$335 million projected for the Interior plan.

The Accounting Plan would produce, based on Interior's paper and electronic bookkeeping records, a ledger for each open IIM account that describes all of the post-1938 transactions in each

account. Sampling would not be used to generate the account statements. Sampling would be used only to verify the accuracy of the statement, consistent with accepted auditing practice.

The court, by contrast, has required the government to verify each transaction individually. 283 F. Supp. 2d at 194-96. (Although the court suggested that Interior could use sampling to perform an audit function, the requirement that each transaction be individually verified would make any additional auditing superfluous.) This requirement dramatically expands the number of transactions to be individually examined. The vast majority of these transactions are for relatively small amounts. Cason Decl. at 4 (estimating that 96.7% of the transactions are for sums less than \$500); see also id. at 2 (the overwhelming majority of land-based accounts - about 96% - receive annual income of less than \$250). Thus, in many instances, the cost of verifying the transaction is likely to be greater than the entire amount of the transaction itself, a result that Congress plainly did not intend. Ibid. ("for the stratum \$0 to \$500, Interior estimates that the average cost of accounting, per transaction, exceeds the average dollar value of the transactions in the stratum"). The court had no basis for overriding the methodology chosen by the agency.

##### **5. Accounting For Funds Never Held In IIM Accounts.**

Not all revenues generated by Indian trust lands are collected and managed by Interior. Accounting Plan at II-4.

Some monies are paid directly to the Indian owner of the land by a third-party lessee. Id. The injunction nevertheless requires Interior to provide an accounting for all such direct payments from third parties since 1887, even though the funds were never held by the government at all, much less placed in an IIM account, and even though Interior thus has no records necessary for an accounting. 283 F. Supp. 2d at 177-81; Cason Decl. 9-10. This ruling, which would require that Interior reconstruct the financial arrangements between individual Indians and third parties (including neighbors and friends), pays no heed to the language of the 1994 Act or common sense.

**6. Third-Party Records.**

Interior's intent was to collect trust-related records from third parties such as oil and timber companies only if it discovered a data gap that could not be addressed with existing federal records. Cason Decl. 10; 283 F. Supp. 2d at 156. The district court rejected this gap-filling approach and directed Interior to issue subpoenas to all third parties that possess trust-records. 283 F. Supp.2d 156-60, 288. This ruling has the potential to embroil the government in ancillary subpoena litigation around the country and to alienate the third parties that conduct business with individual Indians.

## 7. Statute Of Limitations.

In defining the scope of the government's responsibilities, the court concluded that such duties should be defined without regard to any statute of limitations because, in the court's view, claims for "trust mismanagement" have not yet "accrued" for purposes of 28 U.S.C. 2401(a). Cobell v. Norton, 260 F. Supp. 2d 98, 103-06 (D.D.C. 2003); see also 283 F. Supp. 2d at 237 n.78. Rejecting the established rule that limitations periods begin to run when a prospective plaintiff "knew or should have known" of a breach of applicable legal duties, the court reasoned that "the statute of limitations does not begin to run for a beneficiary's claim in equity to enforce the obligations of the trustee until the trustee has repudiated the beneficiary's right to the benefits of the trust." Id. at 105.

The effect of the court's ruling is to render all statutes of limitations inapplicable to this litigation. The trust relationship between the federal government and Indian tribes and individual Indian beneficiaries is established by statute and thus cannot legally be "repudiated." In effect, therefore, the court's ruling allows Indian beneficiaries to sue for any claimed breach of trust occurring at any point in the history of the Indian trust, even if the beneficiary had full knowledge of the alleged breach and failed to bring an action within the six year limitations period.

Unsurprisingly, the law does not suggest that Indian beneficiaries may pursue claims against the government based on events occurring a century ago. To the contrary, the courts have repeatedly held that actions brought by Indian beneficiaries for breaches of trust are barred by the applicable statutes of limitations if the beneficiaries knew or should have known of the alleged breach, without discussing whether the government ever "repudiated" the trust. See, e.g., United States v. Mottaz, 476 U.S. 834, 843-44 (1986) (claim challenging government's sale of plaintiff's interests in Indian allotments was time-barred); Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir. 1990) ("Indian Tribes are not exempt from statutes of limitations governing actions against the United States"); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576 (Fed. Cir. 1988) ("statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress"); Christensen v. United States, 755 F.2d 705, 708 (9th Cir. 1985) (legal and equitable claims based on actions by Bureau of Indian Affairs barred by Section 2401). Likewise, when courts conclude that trust claims brought by Indians are not time-barred, they apply the settled rule that "[t]he statute of limitations begins to run when a trust beneficiary knows or should know of the beneficiary's claim against the trustee." Loudner v. United States, 108 F.3d 896, 901 (8th Cir. 1997).

The district court purported to discover support for its novel rule in a leading treatise. But the very passage quoted by the court makes clear that limitations begin to run from any unequivocal breach of duties owed under the trust:

To cause the Statute [of limitations] to begin running during the life of the trust there must be some unequivocal act in violation of the duties of the trustee or in repudiation of the trust, as where he declines to account to the beneficiary, or takes trust income for his own purposes, or sets himself up as the owner of the trust principal.

260 F. Supp. 2d at 105 (emphasis added) (citing Bogert & Bogert, The Law of Trusts and Trustees § 951, at 638-39 (Rev. 2d ed. 1995)); accord Scott & Fratcher, The Law of Trusts § 219 (4th ed. 1987). As the treatise explains, either a violation of trust obligations or a repudiation of the trust is sufficient to trigger the statute of limitations. See Cherokee Nation of Oklahoma v. United States, 21 Cl. Ct. 565, 571 (1990) (holding that "claims for damages that allege nonfeasance or misfeasance" begin to run when beneficiaries knew or should have known of wrongful conduct).<sup>6</sup>

The district court alternatively suggested that customary limitations principles govern only damages claims, and not claims

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<sup>6</sup> The anomalous ruling in Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973), cannot be reconciled with Ninth Circuit precedent, which has consistently enforced the six-year limitations period in Section 2401 against Indian tribes and beneficiaries without any discussion of "repudiation." Sisseton-Wahpeton, 895 F.2d at 592-95; Christensen, 755 F.2d at 707-08.

for equitable relief. 260 F. Supp. 2d at 107. It is long established, however, that the limitations period in 28 U.S.C. 2401 applies to both legal and equitable claims. Blassingame v. Secretary of Navy, 811 F.2d 65, 70 (2d Cir. 1987) ("the merger of law and equity assured that section 2401(a) covers both legal and equitable actions"); Geyen v. Marsh, 775 F.2d 1303, 1306-07 (5th Cir. 1985) (same). Indeed, several of the Indian trust cases just described presented claims for equitable relief. Sisseton-Wahpeton, 895 F.2d at 592; Christensen, 755 F.2d at 707.

The district court did not explain how claims for trust mismanagement that have not yet accrued could form the basis for a lawsuit. If such claims really do not accrue until a trust has been repudiated, it must also be the case that the claims cannot be asserted until that time. In this suit, however, claims that have not accrued, and thus escape all limitations bars, have nevertheless been made the basis for sweeping relief.

**C. The Court's Self-Created Mandate To "Fix The System" Is Without Legal Basis.**

As we have shown, the legal requirements for an "accounting" set out by the district court have no legal basis and can only be understood as part of its broader program to overhaul the management of Indian trusts. The absence of legal foundation is at least as clear for those parts of the court's injunction that have not even a nominal connection to the performance of an accounting.



At the time of its original declaratory judgment, the district court dismissed plaintiffs' common law claims and recognized that litigants cannot, consistent with the separation of powers, "seek wholesale improvement of [a] program by court decree." 91 F. Supp. 2d at 54 (quoting Lujan, 497 U.S. at 891). Had there been any doubt on that score, it was removed when this Court invoked the same principle, directed the court to amend its opinion to reflect the fact that the only actionable duty was the duty to perform an accounting, and stressed the limits on the court's continuing jurisdiction. 240 F.3d at 1106, 1110.

Despite this Court's clear mandate and in defiance of established principles, the district court expanded its jurisdiction to include the entire field of trust management. The court's error would be clear even if it were limited to circumscribed areas. That the court has assumed responsibility for trust operations generally only underscores why the role of the courts is to review final agency action on the basis of identifiable legal standards grounded in the judgment of Congress, which makes the laws and defines the duties of the federal government.

1. The district court identified only one connection between the 1994 Act and its general assumption of trust operations. The 1994 Act established the Office of the Special Trustee, and directed the Special Trustee to submit to the Secretary and Congress "a comprehensive strategic plan for all

phases of the trust management business cycle that will ensure proper and efficient discharge of the Secretary's trust responsibilities" to tribes and individual Indians. 25 U.S.C. 4043(a)(1). As the district court observed, Interior's Comprehensive Trust Management Plan is the latest iteration of the strategic planning document contemplated by the Act. 283 F. Supp. 2d at 240, 243.

This is not an action to compel completion of a comprehensive plan (and no basis would exist for concluding that Interior has unreasonably delayed in meeting its congressional reporting requirements). Even more fundamentally, it is not for a court to review the adequacy of reports that agencies submit to Congress or to monitor their implementation (neither of which is final agency action that may be compelled under 5 U.S.C. 706(1)). As this Court has stressed, the evaluation of a report from the executive branch to Congress is "singularly committed to congressional discretion." Natural Resources Defense Council v. Hodel, 865 F.2d 288, 318 (D.C. Cir. 1988). It is for Congress as "the recipient of the report to make that judgment and take what it deems to be the appropriate action." Id. at 319. That precept is particularly clear when, as here, the statute contains no standards by which a court could measure the report's adequacy. Ibid. ("we despair at formulating judicially manageable standards by which to gauge the fidelity of the

Secretary's response"); see also Guerrero v. Clinton, 157 F.3d 1190, 1195-96 (9th Cir. 1998) (following this Court's reasoning).

Indeed, it should be self-evident from the plan's contents that supervision of its implementation would be beyond the authority and competence of a court. The plan sets broad "strategic goals," such as fostering increased tribal participation in managing assets, and managing land and natural resources so as to maximize return while meeting beneficiary preferences. Comprehensive Plan at 2-6. Among other things, it proposes a reorganization of the Department of the Interior that is a central aspect of the "multifaceted approach to trust reform." Id. at 4-2. The court plainly had no basis for asserting jurisdiction over such matters and has no continuing jurisdiction to do so.

2. The court not only assumed authority over the matters addressed in Interior's strategic plan; it also directed sweeping changes to its contents, and then required its implementation on a court-ordered schedule.

In transforming the Interior plan, the court required that the agency file a detailed plan identifying "the specific measures that Interior defendants will take as part of their To-Be Plan to bring themselves into compliance with the fiduciary duties imposed upon trustees at common law," 283 F. Supp. 2d at 291, ranging from the duty to make trust property productive to the duty of "co-trustees" Interior and Treasury to prevent the

other from committing a breach of trust, id. at 267-71, 291. Without legal analysis, the court not only exceeded its jurisdiction under 5 U.S.C. 706(1); it also usurped the President's authority to take care that the laws are faithfully executed, requiring that two cabinet agencies police one another on pain of contempt.

In almost casual fashion, the court created new duties that would require radical alteration of trust administration at enormous expense. For example, the injunction provides that "Interior must administer the IIM trust in compliance with applicable tribal law and ordinances." Id. at 287. There are 562 separate, federally recognized tribes in the United States, each with the potential to establish its own set of laws and ordinances. Cason Decl. 12. While Interior consults with tribes regularly, it has never agreed to be bound by hundreds of varying tribal laws, ibid., and there is no legal basis for subjecting the Secretary's duties under federal law to such a requirement. A single line of the structural injunction, without support in any provision of law, creates a duty to do so subject to pain of contempt.

In sum, even without the wholly improper nature of the structural injunction, the court had no basis for concluding that it can enforce its understanding of common law duties without reference to congressional statutes and appropriations.

#### IV. No Basis Exists For The Court's Continuing Jurisdiction.

##### A. Interior's Substantial Progress Precludes Any Basis For The Injunction And Any Inference Of Continuing Unreasonable Delay.

As we have shown, the district court acted without authority in issuing a structural injunction, and the requirements that it imposed have no basis in law.

What should now be clear is that events have overtaken the basis for the court's continuing jurisdiction entirely. The agency has responded to the 1994 Act and this Court's initial decision with an extraordinary commitment of resources that has resulted in significant tangible progress.

As of the time the Accounting Plan was filed, Interior had reconciled 14,235 judgment accounts with balances totaling more than \$40 million. Accounting Plan at I-1. As of February 2004, Interior had reconciled 17,685 judgment accounts with balances totaling nearly \$50.5 million, and 619 per capita accounts worth \$2.6 million. Sixteenth Quarterly Report, at 25-26. Interior's 2004 appropriations fund these ongoing reconciliation efforts, which could not possibly be characterized as ongoing delay.

Nor could the progress made toward reconciling the land-based accounts be transformed into evidence of delay. As Secretary Norton recognized when she took office, the complexities of the land-based accounts made the task of furnishing account statements formidable, and required an

immediate focus of administrative efforts. Within six months of assuming office, the Secretary had created the Office of Historical Trust Accounting, which she charged with developing a plan for historical accounting. Accounting Plan at I-1. In conjunction with OHTA's efforts, Interior engaged five public accounting firms, the largest commercial trust operator in the United States, two historian firms specializing in Indian issues, and firms to assist in statistical issues, trust legal matters and other pertinent areas. Id. at 2. As this Court observed on the contempt appeal, these steps were incompatible with the district court's assessment of the government's progress. 334 F.3d at 1148.

Since that time, Interior has produced a detailed plan for reconciling the land-based accounts and the remaining judgment and per capita accounts within a five-year period. Under that plan, Interior would provide, for each IIM account open in 1994 and thereafter, a verified statement of all funds deposited or invested pursuant to the Act of June 24, 1938. The Accounting Plan reflects a massive investment of money and resources. It is fully consistent with this Court's mandate, and the district court did not conclude otherwise.

At present, under the provisions of the FY 2004 appropriations act, Interior is directing the resources appropriated by Congress to reconciliation of judgment and per capita accounts. It is now for Congress, in consultation with

the agency, to determine whether to fund some form of the Interior plan or to legislate other means of achieving the interests of the account holders. There is no longer any question of agency inaction, and no basis exists for the limited continuing jurisdiction approved by this Court's initial decision.

**B. The District Court's Conduct Of This Case  
Following This Court's Initial Decision Would  
Require That Its Continuing Jurisdiction Be  
Concluded Even If The Basis For That  
Jurisdiction Had Not Ceased To Exist.**

Continuing jurisdiction over agency conduct is rare, and in the unusual cases in which it is asserted, the courts are vigilant to respect the separation of powers. By acting with unprecedented disregard for those principles, the district court would have made it necessary to end its continuing jurisdiction even if its theoretical justification had not ceased to exist.

As we have shown, the district court did not confine its jurisdiction in the manner prescribed by this Court. The court's failure to heed the limitations stressed by this Court resulted in the extraordinary structural injunction that effects a wholly improper assumption of executive branch functions and an equally improper assumption of Congress's authority to direct the appropriation of federal funds.

The court's refusal to recognize the proper limits of intervention was apparent well before the injunction issued. In

the period since this Court's initial decision, the court has treated the Secretary and other Interior officers and employees as unredeemable wrongdoers, rather than as officials of a coordinate branch of government accountable to Congress and the public. Even the apparently innocent requirement for the filing of quarterly reports was transformed into a sustained ordeal in which any statement might be the subject of attack by masters and monitors, and in which statements later determined to be overly optimistic might even be the basis of criminal contempt.<sup>7</sup>

Indeed, the extent to which this litigation has proceeded under the threat and charge of contempt and sanctions appears unprecedented. The district court has held three cabinet secretaries and two under secretaries in contempt and has referred to the Special Master contempt proceedings against 37 non-party employees and counsel. See 283 F. Supp. 2d at 81, 83; 237 F. Supp. 2d 71, 73 (D.D.C. 2003). The court has repeatedly imposed personal sanctions on the government's trial team and the Civil Division's Assistant Attorney General for, e.g., invoking the attorney-client privilege, Cobell v. Norton, 213 F.R.D. 16, 31-32 (D.D.C. 2003), and seeking a protective order from

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<sup>7</sup> For example, in holding the Secretary in contempt for being insufficiently frank about failures in the TAAMS computer system, the court noted that Interior had made significant affirmative disclosures but ruled that the agency had acted improperly because it "ended [its assessment] on a positive note," 226 F. Supp. 2d at 70, and "accentuated the positive aspects of TAAMS," id. at 79.



discovery propounded by the court Monitor whose appointment was later vacated by this Court, Cobell v. Norton, 213 F.R.D. 48, 61-62 (D.D.C. 2003). Because such sanctions are not immediately appealable, little practical recourse exists in litigation that, in the district court's view, may require the full extent of its life tenure, 226 F. Supp. 2d at 161. One consequence of continuing jurisdiction untethered to review of final agency action is to vest the district court with a power to impose sanctions that may remain unreviewable for years.

Defense against the barrage of accusations has been made particularly difficult because the court's Special Master and former Monitor routinely pursue their charges through wide-ranging investigations that lack the protections of the adversary process. As this Court explained with regard to Monitor Kieffer, his "portfolio was truly extraordinary; instead of resolving disputes brought to him by the parties, he became something like a party himself." 334 F.3d at 1142.

Special Master Balaran has likewise undertaken inquiries on matters ranging from asserted failures in the appraisal of Indian rights of way to allegedly misleading omissions in the government's Eighth Quarterly Report. With the court's approval, he has developed his "evidence" through extensive ex parte communications and, indeed, hired a complaining witness to assist him in investigating the complaining party's allegations of government misconduct. See \_\_\_ F. Supp. 2d \_\_\_ [2004 WL 515491].

As should be self-evident, when judicial officers accuse parties of noncompliance with court orders based on extra-record, ex parte contacts, fundamental principles of due process and the fairness of the tribunal are called into question. The problem is magnified when the master or monitor engages in ex parte discussions with the district court judge. Even where every effort is made to restrict the scope of those discussions, they place the court in the unfortunate position of having to distinguish between conversations involving the "essence" rather than the "substance" of matters before the court. Cobell v. Norton, 237 F. Supp. 2d 71, 98 (D.D.C. 2003).

Even apart from such basic concerns, the result of the district court's oversight has been the wholesale diversion of agency resources from the performance of its duties to a continuing struggle to respond to the demands of court monitors and special masters and to the flow of contempt charges and sanctions threats. In refusing to allow Interior to carry out its operations, the court has even barred the government from transmitting completed account statements for judgment and per capita accounts to the account holders without court approval. Indeed, the court has indicated that such conduct would be sanctioned as "unethical contacts" with class members. See Cobell v. Norton, 212 F.R.D. 14, 21 (D.D.C. 2002) (sanctioning government counsel); Cobell v. Norton, 213 F.R.D. 33, 41 (D.D.C. 2003) (denying motion to reconsider order prohibiting Interior

from sending out account statements). The government's motion for leave to send out completed account statements has been pending since February 2003. Dkt. 1784. The effect of the court's continuing jurisdiction is thus to prevent account holders from receiving the accounting that is assertedly the goal of this suit.

In short, even if it were not otherwise clear that no basis for continuing jurisdiction exists, the experience of the past five years demonstrates that the public interest would not be served by a further extension of judicial oversight.

CONCLUSION

For the foregoing reasons, the injunction should be vacated and the case remanded with instructions to dismiss.

Respectfully, submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(c)  
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C)  
that the foregoing brief contains 19,644 words, according to the  
count of Corel WordPerfect 9.

A handwritten signature in black ink, appearing to read 'Alisa B. Klein', written above a horizontal line.

Alisa B. Klein

**CERTIFICATE OF SERVICE**

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